A NEW INTERPRETATION OF THE SHERMAN ACT.*

II.

THE TRUE MEANING OF THE SHERMAN LAW.

WHAT has been said in the preceding part of this discussion addresses itself to the proposition that the SHERMAN ACT does not mean what the District Court assumed it to mean. Naturally, such a negative discussion must be preliminary to a consideration of the more comprehensive question "What *does* the SHERMAN ACT mean?" For, of course, even if the theory of the law upon which the District Court based its judgment was erroneous, still that fact would be of little or no practical importance if *any* tenable theory of the law were to justify the judgment.

It will be the purpose of this part of the discussion to ascertain whether the International Harvester Company has been guilty of a violation of the SHERMAN ACT; and in the determination of that question it will be necessary to discover first just what the SHERMAN ACT, properly construed, does, as well as does not, mean.

In approaching the question just suggested, it is but fair to say that the theory of the SHERMAN ACT which we shall suggest—particularly the differentiation between the meanings of the first and second sections of the Act—has not received express judicial sanction. Language has been used in some of the cases, as will be pointed out, which tacitly approves the distinction; but the courts have not distinguished between the two sections of the Act as clearly and sharply as it would seem the language and history of the Act, as well as the economic conditions responsible for its enactment, justify and require.

But while it is true that the courts have not expressly sanctioned the theory which we shall present herein, it is equally true that they have held nothing that is inconsistent with that theory. The fact that the question then is an open one; that the construction of the Act herein suggested seems so clearly to have been the one intended by its framers at the time of its enactment; and that the adoption of this construction and the application of this test apparently would remove much of the prevailing uncertainty as to the meaning of the Act, as well as simplify its enforcement, seems to furnish the justification for a consideration *de novo* of the Federal anti-trust statute. At first it seems incredible that the point had not been made years ago. But the answer to that is easy. The theory is so simple and so obvious, from even a casual survey of the Act, its history and the

* Continued from the November issue.

history of the law prior to its enactment that it has been overlooked, quite naturally. The result has been a flood of complex theories, each of them dependent upon a refinement of reasoning frequently incomprehensible, each in turn getting farther from the original intent of the law makers than the one it replaced.

The SHERMAN ACT contains eight sections, but only the first and second of them are relevant to this discussion, for it is there that the prohibited acts are enumerated. Those two sections are as follows:

> "SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
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> "SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

It is readily apparent that the first section generally speaking, condemns "contracts . . . in restraint of trade" while "monopolies and attempts to monopolize" are prohibited by the second section. It is equally apparent that a correct understanding of the terms "contracts in restraint of trade" and "monopolies", as those terms are used in the Act, is indispensable to any accurate interpretation of the law. It is to that inquiry that we shall first address ourselves.

In order to interpret accurately the words used by Congress in the anti-trust act, it will be useful to know what, in a general way, were the evils to be remedied and in what offenses the prohibited acts had their counterparts at common law.

It is true that the "monopolies" prohibited by the SHERMAN ACT were not the monopolies known to the common law; but the acts which the second section of the SHERMAN ACT denounces are obnoxious for precisely the same reasons, and because they produce

or tend to produce precisely the same results, as the monopolies of the common law. This brings us to a discussion of the history and common law signification of the two classes of acts enumerated in the first two sections of the SHERMAN ACT—namely, "contracts, etc. in restraint of trade," and "monopolies."

Lord COKE defined "monopoly" as follows:[16]

> "A Monopoly is an Institution, or allowance by the King by his Grant, Commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome or liberty that they had before, or hindered in their lawful trade."

HAWKINS gives the following definition:[17]

> "A Monopoly is an Allowance by the King, to any Person or Persons, of the sole buying, selling, making, working, or using of anything, whereby any Person is sought to be restrained from any freedom which he had before, or hindered from his lawful Trade."

In an essay on the LAW OF PATENTS (1803) JOHN DYER COLLIER traces briefly the history of monopolies. As do the definitions by COKE and by HAWKINS, just quoted, COLLIER'S treatment shows that monopolies, which came to be complained of so bitterly during the reign of ELIZABETH, were rights created by exclusive grants by the sovereign. That these grants, by their very terms, excluded competition goes without saying, *and it was the exclusion of competition which was the distinctive and obnoxious feature of the monopolies known to the common law.* That this, and no other, was the feature of monopolies against which complaint was made is inferable from the three results which it was feared would flow from monopolies, which were:

1. The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public;
2. The power which it engendered of enabling a limitation on production;
3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable result of the monopolistic control over its production and sale.

[16] 3 Coke Inst. 181.
[17] 1 Hawkins, P. C., ch. 79, page 231.

The existence of these evils would not have been feared in case the elements of exclusiveness and of positive and effective exclusion of others from competition had not been present; since, without those elements the occurrence of any one of the three enumerated evil consequences would have been the signal for the appearance upon the scene of new competitors, induced to enter the field by the fact that prices were inordinately high, or that not enough goods were being produced to meet the demand, or that the goods being produced were of an inferior quality. In other words, *unless competition was prevented by the terms of the grant or by some other means equally effective, the operation of natural and economic laws would have made impossible the existence of any or all of the evils which made monopolies objectionable.*

If the foregoing principle requires authority other than the mere statement of the proposition, it is to be found in the case of *Northern Securities Company* v. *United States.*[18] There Mr. Justice HARLAN, in delivering the opinion of the Supreme Court of the United States, quoted with express approval the following language from the opinion in *Morris Run Coal Company* v. *Barclay Coal Company*:[19]

> "When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. * * * The public interest must succumb to it, for it has left no competition free to correct its baleful influence."

Likewise, the principle that the stifling of competition, potential as well as actual, is the bane of monopoly, has economic support too. Professor CLARK of Columbia University in a treatise entitled "THE CONTROL OF TRUSTS" (1912) makes the following observation:[20]

> "Great corporations would seldom be monopolies *if competion were not fettered by altogether abnormal means*—if the independent producer had a fair field and no favor."

Speaking of the origin of monopolies, HUME says:[21]

> "* * * It is astonishing to consider the number and importance of those commodities which were thus assigned over to patentees. * * * When the list was read in the

[18] (1903) 193 U. S. 197, at page 339.
[19] (1871) 68 Pa. 173, at page 186.
[20] Clark, The Control of Trusts (1901), p. 12.
[21] Hume, Parliamentary History of England, vol. 10, pp.

> House, a member cried, 'Is not bread in the number?' 'Bread,' said every one with astonishment. 'Yes, I assure you,' replied he, 'if affairs go on at this rate, we shall have bread reduced to a monopoly before next parliament.' These monopolists were so exorbitant in their demands that in some places they raised the price of salt from sixteen pence a bushel to fourteen or fifteen shillings. Such high profits naturally begat intruders upon their commerce; *and in order to secure themselves against encroachments, the patentees were armed with high and arbitrary powers from the council, by which they were enabled to oppress the people at pleasure, and to exact money from such as they thought proper to accuse of interfering with their patent.*"

In 1601 the clamor of the country was so loud that Elizabeth, to prevent the passage of a statute, "which would be an insult to the prerogative," cancelled the more oppressive of the monopolies.[22]

Respect for the "prerogative" apparently was on the wane during the reign of JAMES I., for in that time Parliament passed a statute forbidding monopolies.

Speaking of the same monopolies which HUME discussed, BEACH in his work on "MONOPOLIES AND INDUSTRIAL TRUSTS," says:[23]

> "It will be observed that monopolies of this character were created, not by a combination of individuals, or of companies, but by royal patents."

It is manifest that to constitute a monopoly, in the old common law acceptation of that term, two elements had to be present: first, a grant from the sovereign, and, second, an exclusion of others from the exercise of rights conferred by the grant.

Gradually there came about a slight modification of the ideas which once prevailed concerning monopoly. And in order to understand this change it is necessary to investigate superficially the law relating to forestalling, regrating and engrossing—particularly the last-named.

BLACKSTONE defines "engrossing," as it was known at common law, as follows:[24]

> "Engrossing was * * * described to be the getting into one's possession, or buying up, large quantities of corn, or other dead victual, with intent to sell them again. This must of course be injurious to the public by putting it in the power

[22] Id. pp. 452-482.
[23] Beach, Monopolies and Industrial Trusts ( ), p. 11.
[24] 4 Blackstone Comm. 158.

> of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity, with intent to sell it at an unreasonable price, is an offense indictable and finable at the common law."

Again the same commentator says:[25]

> "Monopolies are much the same offence in other branches of trade, that engrossing is in provisions: being a license or privilege allowed by the king for the sole buying and selling, making, working or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before."

Moreover, it was held that the quantity purchased was immaterial to the question of whether one had been guilty of engrossing. This point was decided in *Rex* v. *Waddington,*[26] in which Lord KENYON stated the rule as follows:

> "Again it is urged that the quantity purchased can not constitute the offense of engrossing, unless it bear such a proportion to the consumption of the whole kingdom as will affect the general price. This objection is new to me, but if the opinions of Lord MANSFIELD, Mr. Justice DENNISON and Mr. Justice FOSTER, are deserving of attention, there is as little in that objection as in the rest. I well remember an information moved for before them against certain persons for conspiring to monopolize or raise the price of all the salt at *Droitwich.* They had no doubt of its constituting an offense, although it was not pretended that these persons had endeavored to engross all or any considerable part of the salt of the kingdom. Nor was it questioned but that the monopolizing of salt was an offense at common law."

It is clear, from the language just quoted from Lord KENYON'S opinion, as well as the preceding excerpt from BLACKSTONE, that "monopoly" and "engrossing" came for a short time to be used interchangeably. But it is equally clear that "monopoly" and "engrossing" were very dissimilar, the supposed resemblance between the two having been thought to be that each tended to enhance prices, and thus to restrain trade. This view receives express sanction in the opinion in the *Standard Oil* case,[27] wherein it was said:[28]

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[25] Id. 159.
[26] (1801) 1 East 143.
[27] (1911) 221 U. S. 1.
[28] At page 53.

> "It is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing."

It came gradually to be recognized, however, that to prohibit engrossing inevitably restrained rather than stimulated trade, and finally, during the reign of Queen VICTORIA, the offences of engrossing, forestalling and regrating were abolished.[29]

As to the relaxation of feeling against engrossing and its allies, forestalling and regrating, Chief Justice WHITE says, in his opinion in the *Standard Oil* case:[30]

> "From the development of more accurate economic conceptions and the changes in conditions of society, it came to be recognized that the acts prohibited by the engrossing, forestalling, etc. statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. * * * The prohibited acts had come to be considered as favorable to the development of, and not in restraint of trade."

The reason for this altered economic conception is obvious. We have enumerated above—in the language and classification of Chief Justice WHITE—the evils which it was conceived monopolies tended to produce, and because of which monopolies had become obnoxious during the reigns of ELIZABETH and of JAMES I. Likewise, it has been pointed out that the feature of "monopoly" which made possible each one of those evils, and without which the evils would have "found a correction in the conduct of others"—to quote from Mr. Justice HARLAN—*was the complete and effectual exclusion of competition.* Engrossing was wholly wanting in this feature; and, consequently, since it did not possess the single characteristic which in monopolies led to distasteful results, the distasteful results themselves were of course lacking. It was but natural that when that fact came to be realized, the feeling against engrossing should abate

[29] 7 and 8 Vict. cap. XXIV.

[30] (1911) 221 U. S. 1, at page 55.

and the laws against it should be repealed. Which is precisely what happened.

From the history of monopolies and the development of the law concerning forestalling, regrating and engrossing, certain fundamental propositions, indispensable to an accurate analysis of the SHERMAN ACT, are deducible. These propositions may be stated as follows:

1. The common law, from a very early period, has been deeply concerned with seeing that the course of trade be kept "free and unobstructed." Consequently the law looked with disfavor upon any acts, whether by way of contract or otherwise, which operated adversely to that free course of trade; in other words, to acts *which tended to "restrain trade."*

2. "Restriction upon competition," because of its tendency to enhance prices, came to be synonymous with "restraint of trade"—as the latter words are used in their native, non-technical sense, of which more will be said hereafter.

3. Monopolies came to be obnoxious and were prohibited, because, by the very nature of the grant, competition was excluded and thereby prices were enhanced and trade was restrained.

Having disposed of the preliminary question of what constituted a monopoly at common law, and what was its distinguishing characteristic, we pass to a discussion of the law concerning those contracts to which was applied the technical appellation "contracts in restraint of trade." And first it must be noted that the words "restraint of trade," as used in the phrase "contracts in restraint of trade" had a narrow, technical meaning quite apart from the meaning of the words as used to designate the ultimate result which the law was concerned with preventing.

In that narrow technical sense contracts in "restraint of trade" meant contracts whereby an individual placed a voluntary restraint upon his right subsequently to pursue a given calling or to carry on a given kind of business. Since it is our purpose here merely to arrive at the meaning of the words "contract in restraint of trade," rather than to trace the progress of the law as to the validity of such contracts, it is sufficient to say that in the early days the courts would not tolerate any contract, whether reasonable or otherwise, which restrained a man from following his trade or calling; neither the extent of the territory involved nor the time covered by the covenant influenced the court in the slightest degree; it was sufficient if

it appeared that the object of the contract was to restrain the party bound.

The objection to these "contracts in restraint of trade," (accurately so-called) was twofold: first, because they deprived the public of the services and skill of the covenantor; and, second, because the covenantor was thereby deprived of his means of livelihood. Of these, the latter of the two reasons long since has come to be considered as inapplicable to modern conditions, and as unworthy of consideration. The other reason has continued to be regarded as valid. Examined closely, the sole remaining reason why contracts in technical "restraint of trade" are opposed to public policy, and therefore objectionable, is this: they tend, by imposing a voluntary restraint upon the covenantor, to eliminate competition in the particular line of endeavor affected by the contract, *thus enabling the covenantee to raise prices.* The natural consequence of enhanced prices being a diminution in the volume of business done, it is easily seen that these contracts "in restraint of trade" in the technical sense produce the same evil which made monopolies feared and hated, namely, "restraint of trade," in the generic sense of those words.

At common law, therefore, freedom of trade was the ultimate end to be advanced, and acts which, by enabling the enhancement of prices, jeopardized that freedom of trade were deemed objectionable. We have seen that there were two well-known ways by which this enhancement of prices and the consequent restraint upon trade were accomplished—namely, by grants of *monopolies* and by contracts whereby one of the parties bound himself to discontinue his trade or calling, that is, contracts *"in restraint of trade."* Both monopolies and contracts containing these voluntary restraints tended to restrain trade by enhancing prices; *and the one characteristic, present in each, which enabled the monopolist in the one case and the covenantee in the other to raise prices, was the elimination of competition.* So, just as the enhancement of prices and the consequent restraint of trade were the inevitable tendency of "monopolies" and of "contracts in restraint of trade," just so the indispensable means by which that end was effected was the elimination of competition.

Consequently, although at common law the end sought to be prohibited was not the elimination of competition of itself, but rather was enhancement of prices and consequent restraint of trade which were the inevitable result of the elimination of competition, nevertheless the end feared was so incapable of being effected without the assistance of the means—that is, the suppression of competition —that gradually the means and the end came to be referred to as synonymous; and the elimination of competition, having the neces-

sary tendency to restrain trade, came to be spoken of as restraint of trade.

This excusable inaccuracy of expression seems to have had its counterpart in the development of the law prohibiting monopolies. For in the *Standard Oil* case, Chief Justice WHITE says:[31]

> "Prohibitions * * * were directed not against the creation of *monopoly,* but were only applied to such *acts* in relation to particular subjects as to which it was deemed, if not restrained, some of the *consequences* of monopoly might result. * * * In this country also the *acts* from which it was deemed there resulted a part if not all of the injurious consequences ascribed to monopoly, *came to be referred to as a monopoly itself.* In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced."[32]

The evil which Congress wished to remedy by enacting the SHERMAN ACT was the same evil against which the common law had thrown its weight. And the theoretically correct name of that evil was "restraint of trade," these words being used here in their primary, non-technical signification. It may be that Congress was less concerned with keeping "trade and commerce free and unobstructed," as an end in and of itself, than it was with remedying the existing high prices by keeping trade and commerce free and unobstructed. In other words, while the common law aimed at prohibiting means of enhancing prices in order that trade might be unrestrained, the ultimate object itself of the concern of Congress was the prevalence of high prices.

Again, it will have to be conceded that elimination of competition as *an ultimate condition* was no more obnoxious to Congress than it was to the common law; but it *was* obnoxious, *both to Congress and to the common law,* because of its tendency to enhance prices. It would seem, therefore, to be of little moment whether it be said that the intention of Congress was to prohibit restraint of trade *by* making the suppression of competition and the consequent enhancement of prices unlawful; or that Congress purposed merely to remedy the evil of high prices by prohibiting the suppression of competition; or that the ultimate purpose was to prohibit the suppression of

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[31] (1911) 221 U. S. 1, at pages 55-56.

[32] The italics are the writer's.

competition. The difference between the three statements is one of terminology merely. We have no quarrel with those who construe the words "restraint of trade" as synonymous with "restriction of competition"; and equally are we disinclined to disagree with those who, like Justice HOLMES in the *Northern Securities* case,[33] refuse to consider the two phrases as equivalent, preferring to "stick to the exact words used." This quibbling over words, by the way, seems to us to grow out of a failure to recognize that there are, as suggested above, two well-defined uses of the phrase "restraint of trade." For instance, as applied, in its generic sense, to the ultimate evil which Congress wished to remedy, it amounts to substantially the same thing as restriction of competition, for as pointed out, the inevitable result of restriction upon competition is restraint of trade; but, as used in the first section of the SHERMAN ACT, namely, as part of the technical expression "contracts in restraint of trade," it bears not the slightest analogy to "restriction of competition," for in that sense, as Justice HOLMES says:[34]

> "Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business * * * which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would."

In a word, the disagreement on this question is due to a failure to distinguish between the ultimate evil aimed at by the Act, and one of the two sources—*named in the Act*—of the evil aimed at.

The one thing which is important in this connection is that the only method of restraining trade known to the common law was by restricting competition, so for all practical purposes it is sufficiently accurate to say that the primary purpose of Congress in enacting the SHERMAN ACT was to insure freedom of competition and thereby prevent unnatural enhancement of prices. And to put it thus rather than to say that which comes to the same thing—namely, that Congress desired to prohibit restraint of trade—is particularly justifiable on the ground that the first statement removes the possibility that "restraint of trade" as used in its generic sense to signify the evil to be remedied will be confused with the same words which in their technical and more restricted sense are used in the text of the statute.

Accordingly it may be said, as a result of our examination of the common law, that the fundamental purpose of the SHERMAN ACT is

[33] (1903) 193 U. S. 197, at page 403.
[34] Id. at page 404.

to insure freedom of competition, and, as a means of insuring free competition, to make unlawful all acts, whether by way of contract, combination, conspiracy, oppression or otherwise, whose tendency is unduly to limit and restrict competition.

Probably nowhere has the Supreme Court recognized more unequivocally and certainly than in the *Northern Securities* case, supra, the correctness of the conclusion last stated.

Mr. Justice HARLAN, in delivering the opinion of the court, said:[35]

> "The means employed in respect of the combinations forbidden by the anti-trust act, and which Congress deemed germane to the end to be accomplished, was to prescribe as a rule for interstate * * * commerce * * * that it should not be vexed by combinations, conspiracies, or monopolies *which restrain commerce by destroying or restricting competition.* We say that Congress has prescribed such a rule, because, in all the prior cases in this court, the anti-trust act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts free competition among those engaged in interstate commerce; *in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce.*"

In *United States* v. *Trans-Missouri Freight Association,*[36] one of the first cases decided by the Supreme Court construing the SHERMAN ACT, it was contended by the defendants that the Act did not apply to railroads. In disposing of this contention, the court said:[37]

> "Trading, manufacturing, and railroad corporations are all engaged in the transaction of business with regard to articles of trade and commerce, each in its special sphere, either in manufacturing or trading in commodities or in their transportation by rail. A contract among those engaged in the latter business by which the *prices* for the transportation of commodities traded in or manufactured by the others *is greatly enhanced from what it otherwise would be if free competition were the rule,* affects and to a certain extent restricts trade and commerce, and affects the price of the commodity."

Nothing could be clearer than that the court recognized that Congress, in enacting the SHERMAN ACT, had had in mind the

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[35] Id. at page 337.
[36] (1896) 166 U. S. 290.
[37] At page 322.

tendency toward enhancement of prices made possible by elimination of competition.

The same idea is stated somewhat differently at page 333, where the court in answering the contention that unrestricted competition among railroads would prove disastrous both to the railroads themselves and to the public, said:

> "We recognize the argument upon the part of the defendants that restraint upon the business of railroads will not be prejudicial to the public interest so long as such restraint provides for reasonable rates for transportation and prevents the deadly competition so liable to result in the ruin of the roads and to thereby impair their usefulness to the public, and in that way to prejudice the public interest. But it must be remembered that these results are by no means admitted with unanimity; on the contrary, they are earnestly and warmly denied on the part of the public and by those who assume to defend its interests both in and out of Congress. *Competition, they urge, is a necessity for the purpose of securing in the end just and proper rates.*"

And at page 337 the Court quoted approvingly from the opinion of Judge SHIRAS delivered in the Circuit Court of Appeals:[38]

> "Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. * * * That free and unrestricted competition in the matter of railroad charges may be productive of evil does not militate against the fact that such is the law now governing the subject."

In that case, the chief contention of the defendants was that the SHERMAN ACT ought not to be applied to railroads because the free competition prescribed by the Act would in their cases prove disastrous. Accordingly the court devoted practically its entire opinion to answering this argument. The defendants supposed, and the court recognized, that the enhancement of prices by means of suppression of competition was what Congress had attempted to prohibit.

The question is disposed of finally by Chief Justice WHITE in the *Standard Oil* case. In tracing the evolution of the common law down to the enactment of the SHERMAN ACT, he said:[39]

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[38] (1893) 58 Fed. 58, at page 94.

[39] (1911) 221 U. S. 1 at page 58.

> "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that *the dread of enhancement of prices* and of other wrongs *which it was thought would flow from the undue limitation on competitive conditions,* caused by contracts or other acts * * * led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions."

In the case of *United States* v. *American Tobacco Company,*[40] too, the elimination of competition was the significant feature. There, in stating its conclusion that the combination constituted a violation of the Sherman Act, the court said:[41]

> "The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, *but by methods devised in order to monopolize the trade by driving competitors out of business.*"

In *Whitwell* v. *Continental Tobacco Company,*[42] the Circuit Court of Appeals for the Eighth Circuit said in so many words that the SHERMAN ACT was *inspired* by the desire to prevent the stifling or substantial restriction of competition.

Citations could be multiplied if it would serve any useful purpose, but the cases already cited sufficiently support the view that Congress, as well as the common law,—moved as both were by the economic maxim, sound or unsound, that "competition is the life of trade"—was concerned primarily, in passing the SHERMAN ACT, with keeping competition unrestricted; for it was deemed that freedom of competition meant freedom of trade and commerce, and, conversely, that restriction of competition would lead inevitably to restraint on trade and commerce.

The first and second sections of the Act declare in substance that "contracts, combinations and conspiracies in restraint of trade" and "monopolizing any part of interstate trade or commerce" shall be unlawful. The primary purpose of the enactment being to prohibit undue restriction of competition, the enumeration in the first two sections of the Act must be presumed to be an enumera-

[40] (1911) 221 U. S. 106.
[41] At page 181.
[42] (1903) 125 Fed. 454.

tion of the acts which, if not prohibited, the lawmakers deemed would produce such restriction of competition.

The following propositions, therefore, seem fairly established:

1. The object of the SHERMAN ACT was to prevent restraint of trade—as those words are used in their broad, nontechnical meaning—which, because of the fact that elimination of competition is the source of restraint of trade, means nothing more, in effect, than restriction of competition.

2. In furtherance of this main purpose, Congress prohibited certain specific acts—or, more accurately, classes of acts—by which at common law, restriction of competition, and thus restraint of trade, had been effected. These acts are "contracts, * * * in restraint of trade," (these words being used here in their narrow, technical sense) and "monopolies."

Having in mind the *general purpose* of Congress in enacting the law, the task which now confronts us—namely, of interpreting the language used by Congress in designating the specific acts, which in pursuance of its general purpose it declared to be illegal—is greatly simplified. For, since we know what it was that the lawmakers wished to prohibit by the enactment, the ambiguity which otherwise might inhere in the use of some of the words of the statute vanishes.

And here again resort must be had temporarily to the common law. We already have seen that "contracts in restraint of trade" and "monopolies" were obnoxious to the common law. Likewise we have seen that this unpopularity was attributable to the tendency of each class of acts to restrict competition and thus enhance prices and restrain trade.

Since the ultimate tendency of "contracts in restraint of trade" and of "monopolies" always has been supposed to be the same, it may be pertinent to inquire wherein, if at all, the two differed. And, in order to meet that inquiry, it is necessary to recall the definition and the distinctive characteristics of each.

"Contracts in restraint of trade" were, to use the language of Chief Justice WHITE,[43]

> "some *voluntary restraint put by contract* by an individual on his right to carry on his trade or calling."

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[43] In Standard Oil Case (1911) 221 U. S. 1, at page 51.

[43a] 3 Coke Inst. 181.

"Monopoly," to use Lord COKE's definition, is[43a]

> "an institution by the king by his grant, commission, or otherwise, * * * of or for the sole buying, selling, making, working or using of any thing, whereby any persons or corporations are sought *to be restrained of any freedom or liberty* they had before, or *hindered in their lawful trade.*"

Another definition found in HAWKINS'S PLEAS OF THE CROWN is as follows:[44]

> "A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making, working, or using of any thing, *whereby the subject in general is restrained from the freedom of manufacturing or trading* which he had before."

The significant thing about contracts in restraint of trade is that the restraint imposed thereby is *voluntary,* operating only subjectively; whereas the distinctive feature of monopoly is found in the fact that the restraint imposed is *involuntary,* that is, is imposed against the will of, or in any event independently of any act by, the person restrained. In other words, the elimination of competition—the inevitable result of each class of acts—was accomplished in the one case by a contract whereby one competitor agreed, presumably for a consideration, to cease competing; in the other by the *forcible exclusion,* inhering in the nature of the grant itself, of all competitors of the grantee, or "monopolist."

Therein and therein alone did "contracts in restraint of trade" and "monopolies," at common law, differ in the way in which they effected elimination of competition.

Furthermore, in enacting the SHERMAN ACT, Congress meant to make this same distinction, and the first section of the statute was aimed at subjective restraint of competition, the second section at restraint imposed without the concurrence of the restrained competitor. Every indication leads to the conclusion that that was precisely what Congress had in mind.

Let us examine the situation as it existed at the time of the passage of the SHERMAN ACT. Vast combinations had sprung up, each controlling a large portion of the trade and commerce in its particular line, a domination secured by means of the elimination of competition. As at common law, competition had been restricted in two ways; by "contract, combination or conspiracy"

[44] 1 Hawkins, P. C., ch. 79, page 231.

with the competitor himself, whereby the competitor *voluntarily* ceased to compete, and, secondly, by *driving* the competitor out of business by the use of oppressive or unfair business methods which the competitor, handicapped because of the superior strength and resources of the "monopolist," could not survive. Utilizing sometimes the first of the two enumerated methods of restraining competition, as in the *Northern Securities* case;[45] sometimes the second, as in the case of *Loewe* v. *Lawlor*;[46] and sometimes both, as in the *American Tobacco Company* case,[47] these combinations had grown to such size that they were practically omnipotent in their respective fields. Competition having been virtually eliminated, the power was theirs to raise prices as their whims dictated. The existence—to say nothing of the frequent exercise—of this all but absolute power to raise the prices of their products, many of which were necessaries of life, resulted in a nation-wide protest against existing conditions.

It was in answer to this protest, then, and to alleviate the conditions just pictured, that Congress went about the enactment of a law by which the federal government could prohibit effectually—so far as the evil affected immediately and directly commerce between the states and with foreign nations—the undue restriction upon competition which alone was responsible for the abnormal concentration of power in the hands of huge capitalistic combinations. Relying upon the theory of the common law, as stated by Justice HARLAN in the *Northern Securities Company* case,[48] that

> "When competition is left free, individual error or folly will generally find a correction in the conduct of others,"

Congress conceived that the so-called "trust" evil had been made possible by the elimination of competition, and that that being true, the remedy was to remove the source of the evil. To do this, Congress wished to "prescribe the rule of free and unrestricted competition."

Having determined upon the paramount purpose of the Act, the question of how that end was to be reached had next to be solved. And what could have been more logical than the solution reached? What more natural than that Congress should have wished specifically to prohibit the two recognized classes of acts by which, each operating in its own peculiar way, competition had been restricted

[45] (1903) 193 U. S. 197.
[46] (1908) 208 U. S. 274.
[47] (1911) 221 U. S. 106.
[48] (1903) 193 U. S. 197 at page 339.

from time immemorial? And what, finally, more natural than that Congress should have adopted, in making this prohibition, the nomenclature of the common law?

Moreover, that is precisely what Congress did. "Contracts in restraint of trade" always had been the appellation by which agreements voluntarily to withdraw from competition had been known at common law. This appellation was adopted by Congress, and to it was added—lest perchance it prove to be not sufficiently embracing to include all possible acts effecting subjective or voluntary restraint—"combinations in the form of trust or otherwise, or conspiracy."

So, too, with the second section of the act. "Monopoly" long since had ceased to be limited to grants from a sovereign power; but it never had lost its distinctive characteristic, that of necessarily implying an *exclusion* of others from the field of the monopolist.

Recognizing this distinction, Congress provided *in separate sections* of the Act, that, first, "contracts etc. in restraint of trade" and, second, "monopolies" were thenceforth to be unlawful. In no other way can the separation, into two distinct sections, of the offences to be prohibited, be explained.

While it is true that there is nothing appearing on the face of the law itself which would indicate that Congress had in mind the distinction between the two ways in which competition had been impeded,—other than the obvious fact that Congress did not consider "contracts * * * in restraint of trade" to be synonymous and in all respects interchangeable with "monopoly"—the debates in the Senate indicate clearly that the distinction was recognized by the lawmakers in enacting the law.

When the bill, as finally passed, was reported to the Senate by the Judiciary Committee, Senator KENNA, of West Virginia questioned Senator EDMUNDS with reference to the meaning of the word "monopolize" as used in the bill.

In explaining his question, Senator KENNA said:[49]

> "Is it intended by the committee, as the section seems to indicate, that if an individual engaged in trade between States * * * by his own skill and energy, by the propriety of his conduct generally, shall pursue his calling in such a way as to monopolize a trade, his action shall be a crime under this proposed Act? * * * I think I understand what the word "monopoly" means, and my ignorance may have caused me to propound the inquiry; but it does not make any difference

[49] Cong. Rec. 51st Con., 1st Session, page 3151.

how the courts have explained or interpreted the word 'monopoly.' I do not know that the courts have done it, but no matter how they have explained it, here is a provision in the bill which, if plain English means anything in the courts or elsewhere, provides a penalty for such conduct on the part of any citizen of this country engaged in the commonest and most legitimate callings of the country, who happens by his skill and energy to command an innocent and legitimate monopoly of a business."

Senator EDMUNDS, Chairman of the Judiciary Committee, answered the question in the negative, taking the position that the acts supposed would not constitute a monopoly. He said that the word "monopolize" had a technical meaning, which limits its scope to conduct *impeding* competitors and *preventing* them from having equal opportunity with him to engage in the business monopolized.

Senator HOAR, who is supposed to have been the author of the SHERMAN ACT as finally passed, expressed his agreement with the opinion of Senator EDMUNDS on this point, saying:[50]

"I put in the committee * * * the precise question which has been put by the Senator from West Virginia (Senator KENNA) * * * but I was answered, and I think all the other members of the committee agreed in the answer, that 'monopoly' is a technical term known to the common law, and that it signifies—I do not mean to say that they stated what the signification was, but I became satisfied that they were right and that the word 'monopoly' is a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man's self, *by means which prevent other men from engaging in fair competition with him.* Of course a monopoly granted by the King was a direct inhibition of all other persons to engage in that business or calling or to acquire that particular article, except the man who had a monopoly granted him by the sovereign power."

Senator HOAR then was asked whether monopoly as defined by him was prohibited at common law. When, upon replying in the affirmative, he was asked why then it was necessary for the SHERMAN bill to denounce it, he replied:[51]

"Because there is not any common law of the United States * * * The great thing that this bill does, except affording a remedy, *is to extend the common-law principles*

[50] Id. page 3152.
[51] Id.

which protected fair competition in trade in old times in England, to international and interstate commerce in the United States."

It is true, as was said by the court in *United States* v. *Trans-Missouri Freight Association*,[52] that "debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body"; yet it is equally true, as was pointed out by Chief Justice WHITE in the *Standard Oil* case[53] that "that rule is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law."

In reading the debates of Congress for the purpose of ascertaining the "environment" or "history of the period" we possibly may be pardoned if subconsciously we allow our conviction that the word "monopoly" was used in a generally-accepted common-law sense to be strengthened by the views we find expressed there. "Monopoly" in its popular signification means complete present control, and the popular conception has no concern with the *means* by which that control is acquired or maintained. Clearly enough, adopting that view of the word, the case supposed by Senator KENNA in the course of the discussion, would have constituted a violation of the second section of the Act. That such a result was not intended, and that such a meaning was not attributable to the technical "monopoly" declared unlawful by the Act is too clear for argument. As was pointed out by Senator HOAR the characteristic and indispensable feature of monopoly was the prevention of competition, just as—to use his own language—the old monopoly, consisting of a grant from the sovereign, was "a direct inhibition of all other persons to engage in that business."

The view of monopoly which we have just presented receives additional cogent support from the form and language in which the first two sections are couched. It is apparent from the language of Section 1 that the offense there contemplated can be committed only by two or more persons; and it is equally apparent that an offense under the second section can be committed by one person acting alone. This phraseology bears out the theory that the first section relates only to voluntary restraints, which because of their very nature, cannot be effected by one person acting singly, but only by agreement of some sort; and that the second section relates only to

[52] (1896) 166 U. S. 290, at page 318.
[53] (1911) 221 U. S. 1, at page 50.

involuntary restraints, which of course can as well—theoretically, at least—be accomplished by one person as by a number of persons.

There is still another feature of the language used by Congress which is significant, and which demonstrates that Congress did not intend that the mere acquisition of control of even the whole of the commerce in any given commodity should be deemed a "monopoly" unless that control was acquired or maintained by unfairly suppressing competition. The Act prohibits the monopolization of or the attempt to monopolize *"any part* of the trade or commerce among the several States;" so, obviously, the proportionate *amount* of the control acquired is wholly immaterial.

Attention is called to this language of the Act by Justice HOLMES in his dissenting opinion in the *Northern Securities Company* case.[54] There, in discussing the sense in which the words "restraint of trade" and "monopoly" were used in the statute, he said:

> " * * * The mere reading of those words shows that they are used in a *limited and accurate* sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two states it monopolizes a part of the trade among the States. Of course, the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed, every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that the statute forbids a combination of men into a corporation to build and run such a railroad between the states."

By way of illustrating his view Justice HOLMES supposed a case in which a corporation was granted a charter to build certain lines of railroad.

> "It would have been a large one" he says, *"but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter.* A monopoly of 'any part' of commerce among the states is unlawful. The supposed company would have owned lines that might have been competing * * * But the act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end."

[54] (1903) 193 U. S. 197 at page 406.

The same idea frequently has been expressed by the courts wherever there was occasion to determine what does and what does not constitute a monopoly. The unanimous conclusion—which is inevitable in view of the indiscriminate prohibition of *any part* or *all* of interstate commerce,—has been well stated as follows:[55]

> "Magnitude of business does not, alone, constitute a monopoly, nor effort at magnitude an attempt to monopolize."

In *Fonotipia Limited* v. *Bradley* the court said,[56] in holding that a contract between the complainant and another company, to maintain the price of their products was not in violation of the Sherman Act:

> " * * * nor is a 'monopoly,' in the sense meant by the statute, merely the complete occupation of a certain field where that occupation does not unfairly exclude other competitors. The fact that a certain person is the only dealer in certain goods may be entirely consistent with a free and unlimited opportunity to every other person to deal in the same goods, and the law of proper demand and supply may result in but one source from which certain things can be secured, without thereby rendering the person supplying these goods liable to the accusation of illegally maintaining a monopoly."

In *United States* v. *Reading Co.,* it was said:[57]

> "The word (monopoly) is hard to define, and no attempt at exhaustive definition need be made. It will suffice to say that the mere extent of acquisition of business or property achieved by fair or lawful means cannot be the criterion of monopoly. In addition to acquisition and acquirement, there must be an intent *by unlawful means to exclude others* from the same traffic or business, or from acquiring by the same means property and material things."

Since it is clear from the language of the statute that Congress made no discrimination between a monopoly of *all,* and a monopoly of *any part* of interstate commerce; and since it is equally clear, as pointed out by Justice HOLMES, that Congress did not intend to prohibit the acquirement, by legitimate means, of control of "any part" of interstate commerce, it follows that not the proportion of the control acquired, *but the means by which that control was acquired, or is to be retained,* is the criterion by which an alleged monopoly

[55] Per Hook, J., in United States v. Standard Oil Co.(1909)173 Fed. 177, at page 195.
[56] (1909) 171 Fed. 951, at page 959.
[57] (1910) 183 Fed. 427, at page 456.

is determined to be or not to be within the prohibition of the statute. In other words, Congress has said in effect:

> "We care not whether you succeed in acquiring control of *all,* or *any part,* or *none,* of the interstate commerce in any commodity—if you even attempt to obtain control of ever so minute a proportion by *crushing out competition* you shall be held to have violated the second section of this Act."

The cases construing the Act point irresistibly to the conclusion that it was the *crushing of competition* at which the prohibition against monopoly was aimed. On this point WALKER, in his HISTORY OF THE SHERMAN LAW, says:[58]

> "The prevailing view, which has been held by the courts on this point since the enactment of the Sherman law, is that which was held in Congress when the law was about to be enacted; and which view was expressed in the Senate by Senator EDMUNDS and also by Senator HOAR, when they stated that the word 'monopolize' has a meaning in the law *which includes the idea that the monopolist, in making a complete acquirement of the thing monopolized, did something to prevent others from competing with him in reaching that complete acquirement.*"

Likewise the author of JOYCE on MONOPOLIES says:[59]

> "Various definitions have been given of the word 'monopoly,' but the main governing idea is that of exclusive control, *a stifling of competition.*"

And again at page 88 the same author says:

> "The essence of a monopoly is found not so much in the creating of a very extensive business in the hands of a single control. The size of a business alone is not necessarily illegal; it is not in itself a violation of the Federal Anti-Trust Act against unlawful restraints and monopolies and of conspiring to monopolize. The criminal act in the Statute is the certain and necessary prevention of all other persons from engaging in such business, and therefore stifling competition. The evil consists in the destruction of the trade of all other persons in the same commodity and not merely the enlargement of the trade of one person or corporation. *The law is violated by the crushing of competition by means of force, threats, intimidation, fraud, or artful and deceitful means and practices, which violates the law.*"

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[58] Walker, History of the Sherman Law, page 297.
[59] Joyce, Monopolies, page 7.

In *United States* v. *American Naval Stores Co.*,[60] SHEPPARD, District Judge, in charging the jury emphasized the idea that to constitute a monopoly or an attempt to monopolize, more than the mere acquisition of an extensive business is required—that there must be a stifling or suppression of competition by unfair means.

In charging the jury the court said that

> "to constitute the offense of monopolizing or attempting to monopolize under the Act of Congress, it is necessary to acquire, or attempt to acquire an exclusive right in such commerce *by means which will prevent others from engaging therein.*"

As was pointed out by Judge SANBORN in the following quotation from his opinion in the *Standard Oil* case,[61] it is not all monopolies—in the broad sense of that term—that are prohibited by the SHERMAN ACT:

> "It (the anti-trust act) was enacted, not to stifle, but to foster competition, and its true construction is that, *while unlawful means* to monopolize and to continue an unlawful monopoly of interstate and international commerce *are misdemeanors* and enjoinable under it, monopolies of part of interstate and international commerce, *by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts.*"

In *United States* v. *Winslow*[62] it was contended that by virtue of the acts which it was alleged constituted a violation of the SHERMAN ACT, the defendants had acquired control of 98 per cent. of the particular business to which the acts related. The court disposed of that contention in the following language:[63]

> "It is also urged that, as a result of these leases, in combination with the four groups consolidated as alleged, the respondents have dominated 98 per cent. of the business to which these groups related. We do not attach much importance to this percentage, because that, standing alone, is like one of the terms of an algebraic equation, which of itself is non-efficient. As said in *Oliver* v. *Gilmore*, 52 Fed. 562, *a manufacturer or merchant may, by the mere fact of the quality of his goods, monopolize the market, which is permissible.*"

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[60] (1909) 172 Fed. 455.
[61] (1909) 173 Fed. 177, at page 191.
[62] (1912) 195 Fed. 578.
[63] Id. at page 594.

In *Oakdale Mfg. Co.* v. *Garst*[64] the court after saying that "monopolies are liable to be oppressive and hence are deemed to be hostile to the public good," said:

> "But combinations for mutual advantage which do not amount to a monopoly, *but leave the field of competition open to others,* are neither within the reason nor the operation of the rule."

In re Greene,[65] was one of the earliest cases construing the SHERMAN ACT, and is important because of the lucidity of the opinion, written by JACKSON, J. The views there expressed never have been repudiated, but on the contrary have been cited approvingly with great frequency.

The sufficiency of an indictment charging violations of the first and second sections of the SHERMAN ACT was the subject of the court's discussion.

The Court made several observations as to the origin and purpose of the SHERMAN ACT and its relation to the common law. It was pointed out first that there were no common law offenses against the United States, and that only those acts are crimes which Congress specifically has designated.

Continuing, the Court said:[66]

> "When Congress, under and in the exercise of powers conferred by the constitution, adopts or creates common law offenses, the courts may properly look to that body of jurisprudence for the true meaning and definition of such crimes, if they are not clearly defined in the act creating them."

The Court, after holding that the first count was insufficient to charge a contract in restraint of trade and thus illegal under the first section of the SHERMAN ACT, passed to a consideration of the second count, which charged an attempt to monopolize. The specific acts on which that charge was based were that the defendants had agreed that if certain specified purchasers would for six months buy all their supply of distillery products exclusively from the defendants, and would not sell the distillery products at any lower price than the list price of defendants' agents, the defendants would pay a rebate of five cents per gallon.

It was held that the indictment did not charge a "monopoly" or

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[64] (1894) 18 R. I. 484, at page 487.
[65] (1892) 52 Fed. 104.
[66] Id. at page 111.

"attempt to monopolize." As preliminary to its discussion of this question, the Court said:[67]

> "It is very certain that Congress * * * did not * * * declare that when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will in a popular sense monopolize both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged and developed. *But the magnitude of a party's business, production or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns.*
>
> "A 'monopoly,' in the prohibited sense, involves the element of an exclusive privilege or grant which restrained others from the exercise of a right or liberty which they had before the monopoly was secured * * * When this section of the Act was under consideration in the senate, distinguished members of its judiciary committee and lawyers of great ability explained what they understood the term 'monopoly' to mean; one of them saying: 'It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him.' Another senator defined the term in the language of Webster's Dictionary: 'To engross or obtain, by any means, the exclusive right of, especially the right of trading, to any place or with any country, or district; as to monopolize the India or Levant trade.' It will be noticed that, in all the foregoing definitions of 'monopoly,' there is embraced two leading elements, viz., an exclusive right or privilege, on the one side, *and a restriction or restraint on the other,* which will operate to prevent the exercise of a right or liberty open to the public

[67] Id. at page 115.

> before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an 'attempt to monopolize' any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein."

In *United States* v. *Trans-Missouri Freight Association,* SANBORN, J., said:[68]

> "A monopoly of trade embraces two essential elements; (1) the acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) *the exclusion of all others from that right and control.*"

We have seen that at common law the expressions "contract in restraint of trade" and "monopoly" had well-defined technical meanings; and that the classes of acts designated by the two expressions differed radically from each other. By the one was implied a voluntary restraint imposed by contract and operating subjectively upon the contractor; by the other was implied an involuntary restraint, imposed either by an exclusive grant or by other means equally effectual in driving out existing competitors and keeping out potential competitors.

That Congress intended to retain the distinction between the two classes of acts is the conclusion inevitably reached when we apply any one of three possible tests. First of all, the debates in Congress indicate an unmistakable purpose to use the words in their technical, common law meaning; and by prohibiting those acts—which they conceived to be already obnoxious to the common law—to supply the want of a common law of the United States and also to make the acts unlawful and punishable in an affirmative sense. This intent on the part of Congress is made to appear no less clearly by the form, otherwise inexplicable, in which the statute itself was enacted. And finally, aside from the debates and the peculiar form of the statute, the rule that words in a statute must be construed in the light of their common law signification demonstrates beyond any possibility of doubt what the law-makers meant when they prohibited "contracts in restraint of trade" and "monopolies."

Likewise we have seen that in every instance where the courts have had occasion to discuss "monopoly" they have indicated their

[68] (1893) 58 Fed. 58, at page 82.

conviction that monopoly, both at common law and under the SHERMAN ACT, involves necessarily an *exclusion* of others from the field. What the courts *have* failed to point out is that the characteristics of "contracts in restraint of trade" and of "monopolies" make those two classes of acts essentially different; and the result has been a hopeless confusion of the two sections of the SHERMAN ACT.

If it but be borne in mind that Congress, in dividing the enacting part of the SHERMAN ACT into two distinct sections, had in mind two *distinct classes of offenses;* that its only reason for prohibiting both classes of offenses in the same Act was that, although fundamentally different in their operation, the two classes of acts tended to produce the one evil which Congress wished to destroy—namely, restriction upon competition—most of the ambiguity vanishes. Bearing in mind this clear distinction between the offenses prescribed by the first and second sections the application of the law becomes comparatively simple. For example, it never has been considered inordinately difficult to determine whether any given contract in restraint of trade was opposed to the policy of the common law; and while it would be as futile to attempt to enumerate the acts which would be "monopolistic" because of their attempt to oppress and exclude competitors, as it would to enumerate the acts which constitute fraud, it could be determined with comparative ease whether certain specific acts were or were not such acts as tended by their unfairness toward monopoly.

Before applying the law, as we have suggested it should be interpreted, passing attention should be called to one line of cases, under the SHERMAN ACT, which viewed superficially, seem to be inconsistent with the foregoing theory—and, for that matter, with all other theories of the law. Those cases are the *Northern Securities* case[69] and the case of *United States* v. *Union Pacific Railroad Company.*[70] In the former case it was held that the acquisition by a holding company of the capital stock of two competing interstate railroads was in violation of the SHERMAN ACT; and in the latter case the acquisition by the Union Pacific Railroad Company of the controlling interest in the Southern Pacific Company likewise was held to be unlawful.

The two cases would be utterly irreconcilable with all previously existing theories of law, insofar as they hold that one concern may not acquire by purchase the business of a competitor, were it not for

[69] (1903) 193 U. S. 197.
[70] (1912) 226 U. S. 470.

the nature of the business involved. From the first, however, railroads and other quasi-public corporations in whose continued existence and operation the public is presumed to have an interest have been treated differently from ordinary business enterprises. Thus in the *Trans-Missouri Freight Association* case,[71] the court quoted as follows from the opinion of the court in *Gibbs* v. *Consolidated Gas Co.*:[72]

> "The supply of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort * * * Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, yet, in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy."

Justice PECKHAM then went on to say:[73]

> "The above extract from the opinion of the court is made for the purpose of showing the difference which exists between a private and a public corporation; that kind of a public corporation which while doing business for remuneration is yet so connected in interest with the public as to give a public character to its business, and it is seen that while, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads where it well may be that any restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interest."

Accordingly, it may safely be said that it now is the law that no two competing interestate railroads may combine; whereas, of course it is not true that the combination of any two competing concerns engaged in interstate business would be unlawful.

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[71] (1896) 166 U. S. 290, at page 333.
[72] (1889) 130 U. S. 396.
[73] (1896) 166 U. S. 290, at page 334.

Applying the SHERMAN ACT, as we think it should be construed, to the facts of the *Harvester Trust* case, it is at once apparent that there has been in that case no violation of the law (unless, by any chance, it should be said that the holding out of three of the acquired companies as still being independent, was an unfair practice constituting as attempt to monopolize. Since the court below seems to place no emphasis on that fact, it may be ignored here).

The court itself exonerates the defendant of any violation of the second section of the Act, each of the judges emphasizing the fact that "the business conduct of the company towards its competitors and the public has been honorable, clean, and fair." If that be true, and the trial court's unanimous finding of that fact should prevail, there has been no such attempt to exclude competitors by unlawful or unfair means as would have constituted an attempt to monopolize either at the common law or under the SHERMAN ACT.

It is equally clear that there has been no violation of the first section of the Act. There was no conventional restraint imposed upon any of the acquired concerns; the restraint effected was, in the clearest possible sense, merely incidental to the main purpose which was the purchase of the business. Whatever difficulty there may be in the ordinary case in determining whether the restraint is greater than is necessary for the protection of the purchaser, and, so, unreasonable, no such difficulty attends the present case, because here there is *no* restraint, except that necessarily and incidentally occasioned by the purchase of competing companies. And as was said by Justice PECKHAM in the *Joint Traffic* case[74] it never was the law that the purchase by a manufacturer of an additional factory constituted a contract in restraint of trade at all.

It is not the province of this discussion to consider the economic correctness or the political expediency of the existing law; nor to consider whether all combinations of great size, irrespective of all else, should be condemned. We are concerned solely with showing that the present law, properly construed, does not condemn size *per se;* and that since the only theory upon which the International Harvester Company can be said to have violated the SHERMAN ACT is that it has acquired control of almost all of the business in which it is engaged, it has not violated the law at all.

As was stated at the outset, there is no case in which the court has made the clear distinction which we have pointed out between the first and second sections of the Act. However, it seems so clear that the distinction is there, and was intended by Congress to

[74] (1898) 171 U. S. 505, at page 567.

be there; that the Act so construed will be so much more easy to apply to any given state of facts than it is in its present state of uncertainty; and, finally, that the Harvester case is about to present to the Supreme Court of the United States so excellent an opportunity to make the distinction, at the same time without overruling or questioning anything it has yet held or intimated on the question, that it is not too much to hope that the distinction will be drawn, clearly and unmistakably, in the opinion in that case.

CLARENCE E. ELDRIDGE.

Chicago.